

**LETTER OPINION
2009-L-08**

June 4, 2009

The Honorable Al Carlson
State Representative
2548 Rose Creek Parkway South
Fargo, ND 58104-6699

Dear Representative Carlson:

Thank you for your letter asking about the Governor's constitutional authority to develop budget recommendations and to submit appropriation bills to the Legislative Assembly. As is further explained below, it is my opinion that the provision in N.D. Const. art. V, § 7 requiring the Governor to present information on the condition of the state together with any recommended legislation to the Legislative Assembly includes gubernatorial authority to develop and present budget recommendations and appropriation bills.

ANALYSIS

In your letter, you note that the 61st Legislative Assembly passed Senate Bill No. 2001, which, among other things, created a legislative budget committee.¹ As you also noted, the Governor vetoed the provisions of S.B. 2001 relating to the legislative budget committee.² The Governor also vetoed three other sections of the bill which would have amended sections of law regarding budget estimates, appropriations for budget units, and presentation of budget data to the Legislative Assembly.³

The typical budget process for states has been explained as follows:

In some jurisdictions, budget systems for the disbursement of public funds are provided by constitution or statute. While these vary in their provisions, operation, and effect, the general approach is to give the executive branch, including the governor, a central role in preparing the budget to be submitted

¹ See S.B. 2001, §§ 11 and 12, 2009 N.D. Leg.

² See Letter from Governor John Hoeven to Jack Dalrymple, President, N.D. Senate (May 11, 2009).

³ Id.

to the legislature. The legislature reviews the proposed budget . . . and approves or disapproves the various expenditures proposed by the governor.⁴

This explanation is generally descriptive of the budget process in this state. Under the North Dakota Constitution, the “executive power is vested in the governor.”⁵ Further, “[t]he governor is the chief executive of the state. The governor shall have the responsibility to see that the state’s business is well administered and that its laws are faithfully executed.”⁶ In addition, “[t]he governor shall present information on the condition of the state, together with any recommended legislation, to every regular and special session of the legislative assembly.”⁷

Numerous statutory provisions outline the Governor’s role in the state budgetary process and the presentment of budget and appropriation bills to the Legislative Assembly. Budget units file estimates of financial requirements with the Office of Management and Budget (OMB) (headed by a gubernatorial appointee) prior to the commencement of the legislative session.⁸ The director of OMB must prepare budget data containing the Governor’s recommendation for appropriation for each budget unit for the next biennium, drafts of proposed general and special appropriation acts embodying the budget data and recommendations of the Governor for appropriation for the next biennium, and drafts of such revenue and other acts recommended by the Governor for putting into effect a proposed financial plan.⁹

The Legislative Assembly’s organizational session includes a presentation of the budget and revenue proposals recommended by the Governor.¹⁰ The director of OMB must also present budget data information to the Legislative Assembly at the organizational session and proposed legislative acts must be submitted to the Legislative Council after adjournment of the organizational session.¹¹ The official budget report must be transmitted by the Governor to the legislators within three days after commencement of the legislative session. The report must contain the budget and revenue proposals recommended by the Governor, together with other required information.¹²

⁴ 63C Am. Jur. 2d Public Funds § 37 (1997) (internal citations omitted).

⁵ N.D. Const. art. V, § 1.

⁶ N.D. Const. art. V, § 7.

⁷ Id.

⁸ See N.D.C.C. § 54-44.1-04.

⁹ N.D.C.C. § 54-44.1-06(4) and (7).

¹⁰ N.D.C.C. § 54-03.1-03(5).

¹¹ N.D.C.C. § 54-44.1-07.

¹² N.D.C.C. § 54-44.1-08.

After the budget acts are submitted to the Legislative Assembly, it considers the Governor's recommendations and information received through public hearings held in each chamber on each appropriation and revenue bill.¹³ After the Legislative Assembly holds hearings, it passes, defeats, or amends the various budget acts.¹⁴ Once passed by both chambers, each bill is delivered to the Governor for signature or veto.¹⁵

However, the focus of your inquiry relates to the budget-related authority of the Governor under the state constitution. Unlike the constitutions of some other states,¹⁶ the North Dakota Constitution does not make specific reference to developing budget recommendations or drafting appropriation bills, as do the aforementioned statutes. That is not surprising, given the nature of the state constitution; as the North Dakota Supreme Court noted:

Irrespective of the fact that our constitution does not contain a general distributing clause expressly providing for the division of governmental powers among the legislative, executive, and judicial branches of government, provision for those branches of government operates as an apportionment of the different powers. As all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others.¹⁷

¹³ See North Dakota's Budgeting Process, N.D. Legislative Council (Dec. 11, 2006).

¹⁴ See N.D. Const. art. IV, §§ 7 and 13; N.D. Const. art. X, § 12.

¹⁵ See N.D. Const. art. V, § 9.

¹⁶ See, e.g., Saxton v. Carey, 378 N.E.2d 95, 98 (N.Y. 1978) ("The Governor, as chief executive officer, has the responsibility and the obligation to ascertain the financial needs of the various departments and projects of the State government, and to submit to the Legislature for its consideration a budget and various appropriation bills incorporating those needs (N.Y. Const. art. VII, ss 2, 3). It is for the Legislature to review that proposed budget, and to approve or disapprove of the various expenditures proposed by the Governor (N.Y. Const. art. VII, s 4)."); Advisory Opinion In Re Separation of Powers, 295 S.E.2d 589, 594 (N.C. 1982) ("Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the 'Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period.' (2) Article II vests in the General Assembly the power to enact a budget (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget 'as enacted by the General Assembly.'").

¹⁷ City of Carrington v. Foster County, 166 N.W.2d 377, 378 (N.D. 1969) (Syllabus by the Court).

The most pertinent constitutional provision is contained in N.D. Const. art. V, § 7, which, as noted above, provides that the “governor shall present information on the condition of the state, together with any recommended legislation, to every regular and special session of the legislative assembly.” The question is whether this language authorizes the Governor to develop and present budget recommendations and appropriation bills to the Legislative Assembly. This constitutional provision was part of the redraft of article V dealing with the executive branch of state government included in House Concurrent Resolution No. 3009 approved by the people on June 11, 1996, which became effective July 1, 1997.¹⁸

The relevant language in N.D. Const. art. V, § 7 has never been construed by the North Dakota Supreme Court or by this office. Nor was the parallel language from the predecessor constitutional provision construed by the North Dakota Supreme Court or this office.¹⁹ Also, a review of the legislative history of N.D. Const. art. V, § 7 did not provide any insight on the pending issue.²⁰

Principles of statutory construction apply when interpreting constitutional provisions.²¹ When interpreting the constitution, the overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision.²² The intent and purpose of the people adopting a constitutional provision are to be found in the language of the constitution itself.²³

The clear and unambiguous language of N.D. Const. art. V, § 7 gives the Governor the authority to present information on the condition of the state and any recommended legislation to the Legislative Assembly. The constitutional language does not limit the kind

¹⁸ See 1995 N.D. Sess. Laws ch. 646, § 7, and 1995 N.D. Sess. Laws ch. 568, §§ 7 and 14.

¹⁹ Former N.D. Const. art. V, § 5 provided in pertinent part that “[The governor] shall at the commencement of each session communicate to the legislative assembly by message, information of the condition of the state, and recommend such measures as he shall deem expedient.”

²⁰ In N.D.A.G. 2001-F-04, note 5, I reviewed some of the legislative history of HCR 3009: “Representative Brown said the resolution was to simplify language. Hearing on HCR 3009 Before the Joint Constitutional Revisions Comm. 1995 N.D. Leg. (Jan. 25) p. 1. A Legislative Council attorney explained that the purpose of the resolution was to simplify, shorten, and update the language of the executive article. Id. at 2, 3. . . . Senator Andrist noted the testimony showed ‘this resolution really doesn’t change anything but streamlines the language.’ Id. at 9.”

²¹ State v. Hagerty, 580 N.W.2d 139, 143 (N.D. 1998).

²² Id.; City of Bismarck v. Fetting, 601 N.W.2d 247, 250 (N.D. 1999).

²³ Id.

of information or type of condition and recommended legislation that may be presented to the Legislative Assembly. Thus, the “information” and the “condition of the state” would certainly relate to the financial and budgetary condition of the state. And “any recommended legislation” would reasonably include budgetary or appropriation legislation. Consequently, it is my opinion, based on a plain reading of the language of N.D. Const. art. V, § 7, that the Governor is authorized to present financial or budgetary information on the condition of the state to the Legislative Assembly as well as recommended appropriation bills.

You further ask, if it is determined the Governor has the constitutional authority to present budget recommendations and bills to the Legislative Assembly, whether this authority is exclusive to the Governor. As I noted above, the North Dakota Supreme Court has stated that as all branches of the government derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others.²⁴ The doctrine of the separation of powers is implicated in situations where two branches of government may attempt to exercise the same power. The separation of powers doctrine on a state level has been explained in this way:

It is a fundamental rule that the legislature may not infringe upon the constitutional powers of the executive department by interference with the functions conferred on that department by the organic law. However, the legislature may attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or by its power of appropriation, and the legislature may also hold committee hearings, conduct investigations, or request information from the executive branch.²⁵

In addition, it has been noted that

Several jurisdiction [sic] have enacted statutes creating commissions composed of state legislators and members of the executive branch to review and approve the state budget and appropriations, or delegate authority to an executive branch commission to reapportion a state budget. With limited exceptions, these schemes have been found to violate the separation of powers clause of the respective state constitution.²⁶

Nevertheless, courts have recognized that the separation of powers doctrine does not necessarily bar one branch from acting in the sphere of another, especially where

²⁴ See City of Carrington v. Foster County, 166 N.W.2d at 378, 382.

²⁵ 16A Am. Jur. 2d Constitutional Law § 280 (1998); see also N.D.A.G. 2007-L-08.

²⁶ 63C Am. Jur. 2d Public Funds § 37 (1997) (internal citations omitted).

cooperation between the branches is necessary or because “in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree” may be necessary and permissible.²⁷

For example, one court noted that

The principles that governed our separation-of-powers decisions . . . are equally applicable to this case. Where cooperation between the branches is necessary to further the underlying substantive purposes of the legislative enactment, and where the cooperation offers no substantial potential for interference with the exclusive functions of the other branch, the mechanism for legislative involvement will not violate the separation-of-powers principle. But where shared authority is not necessary to effectuate the statutory scheme, or where the legislative intrusion threatens to interfere with exclusive functions of another branch, then the intrusion will violate the separation-of-powers principle.²⁸

Similarly:

The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government.²⁹

Certainly, the crafting of a budget is one of the more complex areas of state government. Further, as described above, the formulation and passage of a budget in this state can be reasonably viewed as a cooperative effort between the executive branch and the legislative branch. Article V, section 7 of the state constitution grants the Governor the authority to present information and propose recommended legislation to the Legislative Assembly. The budget and appropriation bills, however, are just recommendations, and the legislature has the power to approve, disapprove, or amend these recommendations. Also, individual legislators, groups of legislators, or even the Legislative Council may

²⁷ See, e.g., State ex rel. McLeod v. McInnis, 295 S.E.2d 633, 636 (S.C. 1982).

²⁸ Commc'ns Workers of America v. Florio, 617 A.2d 223, 234 (N.J. 1992).

²⁹ State ex rel. McLeod v. McInnis, 295 S.E.2d at 636.

introduce their own appropriation bills,³⁰ and certainly may offer amendments to those submitted by the executive branch.

It is my opinion that the legislature does not have free rein to encroach upon the Governor's constitutional power to present recommended legislation to the Legislative Assembly. On the other hand, I do not believe that any hard and fast rule can be formulated which establishes that the Governor's constitutional budget authority is totally exclusive and that any legislative involvement would necessarily violate the separation of powers doctrine.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³¹

³⁰ See N.D. Const. art. IV, § 12; N.D. Legis. Rules, Senate Rule 401(1) and House Rule 401(1) (any bill conforming to statutory requirements and rules may be introduced by any member, standing committee, or Legislative Council).

³¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).